Filed 8/5/19 In re Robin S. CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re ROBIN S., a Person Coming Under the Juvenile Court Law.	
MENDOCINO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. J.Z. et al., Defendants and Appellants.	A155351, A156055 (Mendocino County Super. Ct. No. SCUK-JVSQ-17-17744-01)

The foster and de facto parents of a now almost two-year-old girl appeal two orders of the juvenile court. The first order changed the girl's placement, pending adoption, from the home of the foster parents to that of her maternal aunt and uncle; the second terminated the birth parents' rights and set a permanent plan of adoption, pursuant to Welfare and Institutions Code section 366.26.[1] The foster parents contend that the court erred by holding a change-of-placement hearing and applying the relative-placement preference of section 361.3 when that preference did not apply, and by permitting representatives of Indian tribes to participate in hearings as if the Indian Child Welfare Act (ICWA) applied to the child, although the court ultimately held that it did not. We conclude that while the court did not in fact apply the relative-placement preference, it did

[1] All statutory references are to the Welfare and Institutions Code unless otherwise noted.

not err in considering the factors listed in section 361.3 when it analyzed the child's best interest. Any arguable error in permitting tribal representatives to participate was harmless. The court here was called upon to make an exceedingly difficult choice between two excellent, loving homes for the child. Although the difficulty was exacerbated by the passage of time, the court approached the task thoughtfully and considered appropriate factors; it did not abuse its discretion in making the difficult choice before it and we shall affirm its orders.

Factual and Procedural History

When Mother gave birth, the child tested positive for marijuana and methamphetamine. The hospital briefly released the child to Mother's care, but the Mendocino County Health and Human Services Agency (the agency) obtained an emergency protective order authorizing it to remove the child. The agency placed the child in the certified foster home of the foster parents, who began providing her with what would prove to be 12 and a half months of excellent care.

The agency filed a petition under section 300 on August 28, 2017, alleging that Mother and the alleged father, N.B., had drug problems that kept them from caring for the child, and that had caused Mother to lose custody of two older children, who live in Modoc County with Mother's sister (the aunt). N.B.'s whereabouts were unknown. At a detention hearing the next day—the only hearing at which Mother appeared—Mother said that she was certain N.B. was the father, but he had not acknowledged paternity. The detention report stated that N.B. is a member of the Round Valley Indian Tribes and was thought to have "no interest in the baby."

Mother's father reported that he is a member of the Wiyot Tribe, so the agency sent ICWA notices to the Round Valley and Wiyot Tribes. It also attempted to find N.B. Elizabeth RedFeather, an ICWA coordinator for the Round Valley Tribe, told the agency that N.B. is an enrolled member but that the child would not be eligible for enrollment until the tribe obtained a genetic test confirming N.B.'s paternity.

The court continued the jurisdictional hearing several times because Mother was unavailable. Mother's counsel told the court that Mother wanted the child placed with the

aunt and uncle. On September 25, a month after the child began living with the foster parents, the aunt requested that the child be placed with her. On October 26, the court held a jurisdictional hearing. Neither parent appeared. The court sustained the petition and set a disposition hearing for November 15.

The agency's report for that hearing urged the court to bypass reunification services for Mother (§ 361.5) and noted its intent to place the child with the aunt and uncle. The child's counsel stated that she was doing well in the foster parents' "very loving and supportive foster home" but recommended that she be placed with the aunt and her half-siblings. The court heard expert testimony that placement with the aunt would be consistent with Indian culture. The court removed the child from her parents' care, bypassed reunification services, and found "[t]he permanent plan of permanent placement with [the aunt], with a specific goal of guardianship . . . necessary and appropriate."

For the next 10 months the agency and tribal representatives tried to secure genetic testing of N.B. or to otherwise determine whether the child is a member of a tribe and eligible to enroll. The representatives included Ms. RedFeather of the Round Valley Tribe and Chris Piekarskie, ICWA coordinator for the Redwood Valley Rancheria, to which the aunt's husband belongs. The court held several hearings to explore whether the child qualified as an "Indian child" under ICWA and, pending resolution of that issue, repeatedly continued hearings on other issues, including whether to transfer placement of the child to the aunt's home.

In January 2018, a Modoc County social worker approved the aunt's home for placement. The Mendocino County agency did not seek immediately to transfer the child to the aunt and uncle for several reasons: their phone service was disconnected for a time, they failed to realize they could visit the child, and a possible lapse in communication between the two agencies. However, in April 2018, the child began visits with the aunt and uncle. In addition, they told the court that Mother and N.B. had signed forms naming them the child's Indian custodians. Neither parent ever appeared to authenticate their signatures on the forms.

When the child was eight months old, the agency requested authority to transfer placement from the foster parents to the aunt. The agency commended the foster parents' excellent, nurturing care of the child, but noted that it had told the foster parents that the child "would eventually be . . . placed with her maternal aunt." The court scheduled the placement issue to be heard on May 3, along with the foster parents' request to be designated de facto parents. The agency filed a report addressing the factors listed in section 363.3 for assessing placements subject to the relative-placement preference. While acknowledging the child's "close parent-child relationship" with the foster parents, the report concluded that the child could build such a relationship with the aunt and that it is in her best interest to live with her extended family and half-siblings.

On May 3, the court granted the foster parents' unopposed request for de-facto-parent status; appointed counsel for them; and asked the parties to return to address the relative-placement request on May 22, the date set for a six-month review hearing. The court ordered overnight visits with the aunt in the interim.

On May 22, with Mother's whereabouts still unknown, the court set a section 366.26 hearing for September 11. On the placement issue, it received a report that the child had begun overnight visits with the aunt, that both families sought to adopt her and that the agency favored placement with the aunt but considered either placement appropriate, as both families "love and care for [the child] and can fulfill all of her emotional and physical needs." Believing it should resolve the ICWA question before ruling on a change of placement, the court continued the placement hearing to June 27 (without objection) and set an interim hearing on June 19 to review the ICWA issue. The foster parents then filed an objection to removal of the child from their care and a request to be designated "prospective adoptive parents" (§ 366.26, subd. (n)).

On June 19, the court continued the ICWA review at the agency's request. On June 27, the agency asked the court to again continue the change-of-placement hearing because of ongoing ICWA efforts. The court repeated its preference to resolve the ICWA issue before deciding placement, and counsel for the foster parents endorsed that view.

The court continued to August 8 the issues of placement, ICWA review, and the foster parents' request for prospective-adoptive-parent status.

On August 8, the agency reported that the Round Valley Tribe newly took the position that the child was eligible to enroll without genetic tests. The ICWA issue remained unsettled, however, because ICWA would apply only if the child were both eligible for tribal membership *and* proven to be a biological child of a member. The court reiterated its view that it should resolve the ICWA issue before placement, and the foster parents' counsel again agreed. The court again continued the ICWA hearing and change-of-placement request, this time to September 10.

On September 10, after learning that efforts to arrange genetic testing had proven fruitless, the court held that "for the time being, the finding is that [the child] is not an Indian child, because the court does not have reason to know that one of [the ICWA] criteria [is satisfied]," though "that could change." The court then conducted the oft-continued hearing on the request to change the child's placement.

The foster parents testified that the child had flourished in their care, was bonded to them and their other children, and called them "Mama" and "Dada." After visits with the aunt, she was clingy and upset to be out of the foster parents' presence. The foster parents presented evidence of the child's development and a log summarizing her visits with the aunt.

The aunt testified that she had indicated in September 2017 that she wanted the child placed with her, that the agency had asked her and her husband to undergo background checks, and that they had promptly done so, passing in October and November, respectively. They "didn't know we could get visits right away" and waited for the Modoc County agency to inspect their home, which it did after Christmas. They also thought they were required to finish taking classes and fulfill other requirements before they could visit the child. The aunt was in frequent contact with Debbie Bagwell, a Modoc County social worker, who told her to await a call from the Mendocino County agency to arrange visitation.

The aunt's home was approved for placement in January, but the aunt did not meet the child until April. When cross-examined as to why she did not contact the Mendocino agency sooner about visitation, the aunt testified that she communicated frequently with Ms. Bagwell, who she assumed was communicating with Mendocino County. She confirmed the accuracy of the foster parents' log showing that the child spent roughly 200–250 hours with the aunt on 9 or 10 separate occasions between April 2 and August 8. The aunt explained that the 12-hour round trip from Modoc County and the needs of her four children and animals made it difficult to visit more often.

The court then heard arguments. The agency's counsel briefly stated that "[i]t's a very difficult question . . . [with] two good families," but the agency still recommended the aunt. Mother's appointed counsel briefly opined that the child "would thrive in either home" and took no position. The foster parents' counsel contended that the relative-placement preference did not apply, that the aunt should have been more proactive in seeking visitation months earlier, and that the child had now bonded with the foster parents for over a year and would suffer if removed from the care of the only parents she had ever known.

The court allowed two tribal representatives to briefly speak. Mr. Piekarskie praised the foster parents' efforts and stated that the aunt and uncle had done their best despite their distance from Mendocino and lack of experience with the system. Ms. RedFeather defended the aunt's diligence, argued that the agency had failed both families by letting the child bond with the foster parents instead of transferring her sooner to the aunt, and expressed her tribe's support for placing the child with her biological family.

Finally, the child's counsel echoed the consensus that both families were "very warm and loving" to the child; asked the court to "take lightly the recommendation of the tribe" because "this is not an ICWA case"; and argued that the aunt and uncle "did sit on their hands a bit," and could have visited more often.

The court began its ruling by stating that, while "everybody thinks it's a tough decision, and it is," but "it's a tough decision between a couple of good possibilities." The court stated that the relative-placement preference did not apply but that it would use the

factors listed in section 361.3 as a framework for comparing the two potential placements to determine the best interest of the child: "I think this is probably not a relative placement case, because even though [the rule of *In re*] *M.H.* [(2018) 21 Cal.App.5th 1296 (*M.H.*)] doesn't apply because [the relative in *M.H.*] was a great aunt, it is true that [here] the minor has bonded with the foster parents and there's probably no need for a new placement just on that basis. [¶] Nonetheless, the criteria listed [in] the 'relative placement' [statute are] there for the purpose of defining [a child's] best interest. I think they are instructive and helpful for the court to look at to determine what the best interests of the minor are."

Turning to the first factor, "best interest of the child" (§ 361.3, subd. (a)(1)), the court had "no doubt" that "both homes can be quite loving" to the child. It found that the aunt and uncle had not "sat on their rights" but had worked "diligently to try to make [the placement] happen," while hampered by distance and by having four children. The court deemed it "unfortunate" that the change-of-placement process had "lasted so long," attributed the delay to the ICWA/paternity issue, and noted that the aunt had come from Modoc County for almost every hearing, "which is impressive to the court."

As for the "wishes of the parent" (§ 361.3, subd. (a)(2)), the court said that it had "some significance," and found that Mother had signed a form stating her wish that the aunt raise the child "[I]f this were a relative placement analysis, [that would be] one of the criteria the court would have to look at." Turning to the "[p]lacement of siblings and half-siblings in the same home" (§ 361.3, subd. (a)(4)), the court found the aunt's custody of the child's half-siblings "very important." While "these are not half-siblings [with whom the child] has a close bond," the court was "fairly confident that [she] could have a strong bond with them over time."

The court found three of the factors to be neutral: the "good moral character of the adults" (paraphrasing § 361.3, subd. (a)(5)), the "ability of the relative to do various

things" (paraphrasing § 361.3, subd. (a)(7)),[2] and the "safety of the homes" (paraphrasing § 361.3, subd. (a)(8)).

Finally, the court addressed the "nature and duration of the relationship between the child and the relative" (§ 361.3, subd. (a)(6)), which it rephrased as the "nature and duration of the relationship between the child and in each case the respective homes." "There is no doubt in my mind that the bond between [the child] and her foster parents, de facto parents, is much stronger than it is between her and the [aunt]. I'm really glad there's a good strong bond there. Partly, it shows that this is a child who probably has the ability to bond. [¶] . . . [The foster parents have] enabled this child to learn how to bond to various people. [¶] At this point, I do believe that [the child] is going to be able to bond [as] well to the [aunt] . . . as she has bonded to the [foster parents]. So even though there's been a longer relationship and there is a very strong bond between the [foster parents] and [the child], I don't find that to be a reason not to place [her] with the [aunt]."

The court concluded its analysis: "Under the circumstances, the court does find that under the best interests of the child, particularly given the parents' wishes and the half-siblings' [presence] with [the aunt], that I am going to place the child with the [aunt]. [¶] I appreciate immensely what the [foster parents] have done. I know you're going to be heartbroken by this. But I think it's still in the best interest of the minor that she be placed with the [aunt]." The court denied the foster parents' request for prospective-adoptive-parent status.

The court continued the section 366.26 hearing to October 31. Before that date, the foster parents filed a notice of appeal encompassing the September 10 placement order (case No. A155351). At the section 366.26 hearing, the court terminated parental rights, found the child adoptable, and ordered a permanent plan of adoption, as well as four

[2] Subdivision (a)(7) of section 361.3 addresses a relative's ability to give the child "a safe, secure, and stable environment," "proper and effective care and control," and "a home and the necessities of life"; to "protect the child from his or her parents"; to facilitate reunification efforts with parents, visitation with other relatives, and implementation of the case plan; to "provide legal permanence for the child if reunification fails"; and to arrange "appropriate and safe child care, as necessary."

months of visitation, of tapering frequency, with the foster parents. The foster parents filed a notice of appeal from this order (case No. A156055), and the two appeals have been consolidated.

Discussion

1. *The juvenile court did not abuse its discretion by considering the factors listed in section 361.3 when it determined the child's best interests.*

Subdivision (a) of section 361.3 mandates that when "a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request by a relative of the child for placement." The section lists eight factors that must be considered in "determining whether placement with a relative is appropriate." Subdivision (d) of section 361.3 adds that, "[s]ubsequent to the [disposition] hearing conducted pursuant to Section 358, whenever a new placement of the child must be made, consideration for placement shall again be given . . . to [appropriate] relatives . . . ." The statute defines "preferential consideration" to mean that a "relative seeking placement shall be the first placement to be considered and investigated." (§ 361.3, subd. (c).) The relative-placement preference " 'does not create an evidentiary presumption that relative placement is in a child's best interests.' " (*M.H.*, *supra*, 21 Cal.App.5th at p. 1304.)

The foster parents contend that the juvenile court erroneously applied the relative-placement preference at the placement hearing on September 10, 2018, even though the child had been removed from the physical custody of her parents over a year earlier, and even though the initial placement was highly successful, so that a new placement was not necessary. By improperly invoking the relative-placement preference to change the child's placement on the eve of the section 366.26 hearing, the court assertedly circumvented the caretaker-placement preference of section 366.26, subdivision (k): "Notwithstanding any other law, the application of any person who, as a . . . foster parent, has cared for a dependent child for whom the court has approved a permanent plan for adoption, or who has been freed for adoption, shall be given preference . . . over all other applications for adoptive placement if the agency making the placement determines that the child has

substantial emotional ties to the . . . foster parent and [that] removal from the . . . foster parent would be seriously detrimental to the child's emotional well-being."

The parties discuss opinions addressing the tension between the preference for placing a child removed from its parents with a relative (§ 361.3) and the interest in providing the child with stability and continuity reflected in the so-called caretaker-placement preference (§ 366.26, subd. (k)). (E.g., *M.H.*, *supra*, 21 Cal.App.5th 1296; *In re Isabella G.* (2016) 246 Cal.App.4th 708; *In re R.T.* (2015) 232 Cal.App.4th 1284; *In re Joseph T.* (2008) 163 Cal.App.4th 787; *In re Lauren R.* (2007) 148 Cal.App.4th 841; *In re Sarah S.* (1996) 43 Cal.App.4th 274.) A dilemma too frequently arises when circumstances prevent initial placement of the minor with a relative and, over an extended period of delay, the minor bonds with the nonrelative foster parents with whom it has been temporarily placed.

The situation in *M.H.* was in many respects similar to that in the present case. There, neither statutory preference applied. The juvenile court was held not to have abused its discretion in finding that the best interests of the child favored adoption by the foster parents who had raised him for some 14 months rather than by an out-of-state great aunt with whom placement had been delayed by certain licensing requirements. Recognizing the "unusually difficult question" presented by the choice between "two good options" (*M.H.*, *supra*, 21 Cal.App.5th at p. 1305), the juvenile court reasonably determined that, under the particular circumstances before it, continued placement with the foster parents was in the minor's best interests.

Here too, at the September 10 hearing, strictly construed neither statutory preference applied. As the juvenile court acknowledged, the relative placement preference did not apply because the child had already been placed and she was receiving excellent care in that placement. The caretaker preference did not apply, as the court had not yet approved a permanent plan for adoption or freed the child for adoption. (See, e.g., *M.H.*, *supra*, 21 Cal.App.5th at pp. 1303–1304.) Here too the juvenile court focused on the particular circumstances before it to determine which of the difficult choices was in the child's best interests. Unlike the juvenile court in *M.H.*, the court here reasonably

concluded that, despite the child's existing bond to the foster family, her interests were best served by placement with and adoption by relatives who were parenting her half-siblings.

The foster parents' contention that the juvenile court reached this conclusion because it erroneously applied the relative-placement preference is simply incorrect. The juvenile court repeatedly made clear that the statutory preference did not apply or govern the outcome. The court clearly and consistently focused on the best interest of the child, using the factors listed in section 361.3 as a framework for its analysis: "the criteria listed [in] the 'relative placement' [statute are] there for the purpose of defining [a child's] best interest. I think they're *instructive and helpful for the court to look at to determine what the best interests of the minor are*." (Italics added.) The foster parents do not contend, nor could they, that any of the factors in section 361.3 that the court considered was irrelevant or improper to consider in evaluating the child's best interest. At bottom, the foster parents disagree with the manner in which the court balanced the appropriately considered conflicting considerations. But that difficult call was within the discretion of the juvenile court (*M.H.*, *supra*, 21 Cal.App.5th at p. 1305, citing *In re Stephanie M.* (1994) 7 Cal.4th 295, 317-318) and there is no basis to hold that the court's decision was an abuse of discretion.

The foster parents argue that the change in the child's placement on September 10 deprived them of the right to be designated as prospective adoptive parents (§ 366.26, subd. (n)), in which case the child could not have been removed from them without proof "by a preponderance of the evidence that the removal is in the best interest of the child." (Cal. Rules of Court, rule 5.728(f); see § 366.26, subd. (n)(3)(B).) But even if the court erred in modifying placement on September 10—which we conclude it did not—the court did explicitly find that it was in the child's best interest to remove her from the foster parents' care. Although their care was not in any way inadequate, the court reasonably found that the child's long-term best interest was to be placed with her half-siblings for adoption by her aunt and uncle. Neither the juvenile court nor this court was or is

insensitive to the foster parents' understandable anguish, but the court's ruling was neither an abuse of discretion nor prejudicial to their rights.

2. *Permitting Indian tribe representatives to participate in hearings caused no prejudice.*

The foster parents argue the court erred by "conducting the proceedings as if ICWA applied" and permitting tribal representatives to participate, assertedly denying them a fair hearing by "artificially strengthen[ing]" the agency's position in favor of placement with the aunt and "unfairly diminish[ing]" the foster parents' voices. The foster parents cite *In re Abbigail A.* (2016) 1 Cal.5th 83, which invalidated a former Rule of Court requiring juvenile courts in proceedings involving children eligible for tribal membership who did not satisfy ICWA's definition of an "Indian child" to "proceed as if the child was an Indian child." (*Id.* at p. 88.) The agency responds that federal regulations promulgated after *Abbigail A.* require a court that has "reason to know" that a child is an Indian child to "[t]reat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an 'Indian child.' " (25 C.F.R., § 23.107(b).) Thus, we doubt that the court erred in allowing tribal representatives to participate in the hearings that preceded its September 10 determination that the child had not been shown to be an "Indian child."

In any event, the court clearly held on September 10, before the placement hearing, that the child had not been shown to be an "Indian child" under ICWA, and the court did not apply any provision of ICWA in making the subsequent rulings at issue on appeal. The foster parents have made no meaningful attempt to bear their burden of establishing that permitting the tribal representatives to speak at the September 10 hearing, if error, was prejudicial. (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 653, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) Our review of the record reveals no hint of prejudice. The tribal representatives' brief comments were not inflammatory or misleading, and the court's analysis made clear that it had independently concluded that the change in placement was in the child's best interest. The foster parents' assertion that there can be "little doubt the juvenile court was improperly influenced by arguments favoring sibling

placement made by tribal representatives whose views should not have been considered" is not supported by any comments of the court or of any other participant at the hearing. There is no indication that anything the tribal representatives said swayed the court to reach a different conclusion than it would otherwise have reached.

Disposition

The challenged orders are affirmed.

POLLAK, P. J.

WE CONCUR:

STREETER, J.
BROWN, J.